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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 154

WONG YANG SUNG,

Petitioner,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

JACK WASSERMAN,
GASPARE CUSUMANO,
IRVING JAFFE,
Of Association of Immigration and Nationality Lawyers, Warner Building, Washington, D. C.; Attorneys for Petitioner

THOMAS A. FARRELL,
Of Counsel

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REPLY BRIEF

POINT I

PETITIONER AND RESPONDENTS ARE IN AGREEMENT (1) THAT DEPORTATION STATUTE DOES NOT IN TERMS PROVIDE FOR A DEPORTATION HEARING. (2) THAT THE RATIONALE OF THE COURT BELOW IS ERRONEOUS

The respondents and petitioner are in agreement that the deportation statute does not *in terms* provide for a deportation hearing. The main contention of the government

(Point I) that a deportation hearing is not required by statute necessarily takes issue with the reasoning of the court below and that of *Azzollini* v. *Watkins*, 172 F. 2(d) 897. Petitioner likewise but for different reasons believes that the reasoning of these courts is erroneous.

The government correctly asserts in Point I of its brief (p. 17) that Section 7 of the Administrative Procedure Act and the exemption under Section 7(a) can be invoked only where an adjudication is required by statute after opportunity for a hearing. It was therefore a basis of the decision below herein and of the *Azzollini* case that the deportation statute required a hearing. The government attacks this conclusion in Point I of its brief but invokes it in Point II asserting that deportation hearings are not only statutory but that the statute specifically requires that hearings shall be conducted before immigrant inspectors.

Petitioner believes that deportation hearings are required as a matter of statutory construction and that the statute as interpreted by the Constitution requires a hearing. We feel that this is sufficient to bring the case within Section 5 of the Administrative Procedure Act. We agree with the government that the statute does not *in terms* prescribe that a deportation hearing shall be held. For this reason, the opinion below was erroneous. If the statute does not in terms require a hearing, it cannot require that such hearing shall be held before immigrant inspectors.

Point II

SECTION 16 OF THE IMMIGRATION ACT OF 1917 DOES NOT PROVIDE FOR DEPORTATION HEARINGS BEFORE IMMIGRANT INSPECTORS

The court below relied on Section 16 of the Immigration Act of 1917 (8 U.S.C. 152).

Section 16 provides that the "examination of aliens arrested in the United States under this section shall be con-

ducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry." This is a provision for the preliminary examination of aliens prior to hearings by boards of special inquiry. It is not a provision for any formal hearing. It obviously is not a provision for the conduct of deportation proceedings. If it were, it would be an explicit statutory direction to conduct hearings in deportation cases and to conduct them before immigrant inspectors. An *examination* is not a hearing. Moreover, deportation or exclusion hearings are not confined to the "examination of aliens" alone. Witnesses are usually presented by the opposing sides. The "examination of aliens" cannot therefore be stretched to include (1) a hearing, (2) a hearing of aliens and witnesses and (3) a deportation hearing. It should also be noted that arriving aliens can be—and usually are—arrested in the United States only at the border, at seaports, and on board their vessels. Immigrant inspectors have no extraterritorial powers of arrest. Therefore Section 16, in speaking of aliens arrested in the United States, does not as contended by the government plainly refer to aliens who may be deported rather than excluded.

Section 16 also grants authority to immigrant inspectors "to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and where such action may be necessary, to make a written record of such evidence." This provision can be understood only in the light of its statutory history.

Section 24 of the 1907 deportation statute (34 Stat. pt. 1, pp. 898, 906) provided in part:

> Immigrant officers shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such evidence; and any person to whom such an

> oath has been administered under the provisions of this act who shall knowingly or wilfully give false evidence or swear to any false statement in any way affecting or in relation to the right of any alien to admission to the United States shall be deemed guilty of perjury and be punished as provided by section fifty-three hundred and ninety-two, United States Revised Statutes."

There can be no doubt that Section 24 of the 1907 statute related solely to arriving aliens. (See: *Bouvé*, The Exclusion and Expulsion of Aliens in the United States, 1912, at pp. 284-287.)

The committee reports which accompanied the Immigration Act of 1917 disclose that Section 16 was intended to apply only to arriving aliens.

Senate Report 355, 63rd Congress, 2nd Session, p. 10 states with reference to Section 16:

> "In this section are combined such provisions of Sections 17 and 24 of the act of 1907 as relate to the *examination of arriving aliens*. Various provisions have been added with a view to perfect the 'machinery' and to make the examination thorough and effective." (Italics supplied.)

Identical language will be found in Senate Report 352, 64th Congress, 1st Session, p. 12.

Several conclusions emerge from the foregoing. First, section 16 was not intended to cover the deportation process but only the *examination of arriving aliens*. It deals primarily and solely with arriving aliens. 8 U.S.C. 155 (Section 19) is the deportation section of the 1917 statute. Secondly, in granting immigrant inspectors power under the 1907 statute "to take and consider evidence" authority was not granted to conduct hearings. Section 24 of the 1907 statute distinctly referred to arriving aliens. Arriving aliens are first examined by immigrant inspectors but only granted hearings before boards of special inquiry.

(Section 25 of the 1907 statute; Section 17 of the 1917 statute, 8 U.S.C. 153). The use of the identical language in the 1917 statute granting immigrant inspectors authority "to take and consider evidence" should therefore not be construed as authority for the proposition that immigrant inspectors are empowered by this section of the statute to conduct hearings, even in exclusion proceedings, much less deportation proceedings.

Thirdly, assuming that the deportation process is encompassed in Section 16 as has been held by *Graham* v. *United States*, 99 F. (2d) 746 and *Loufakis* v. *United States*, 81 F. (2d) 966 without analysis or knowledge of its legislative history, no provision is made therein for deportation hearings before immigrant inspectors. Neither the *Graham* nor *Loufakis* cases indicate whether they were there concerned with preliminary examinations or investigations in deportation proceedings (8 C.F.R. 150.1) or the formal deportation hearing itself. (8 C.F.R. 150.6). Authority to conduct the informal preliminary inquiry does not cover authority to preside at the formal deportation hearing. See: *Report of Secretary of Labor's Committee on Administrative Procedure* (The Immigration & Naturalization Service), p. 66. The exemption of Section 7(a) of the Administrative Procedure Act is only applicable if Section 16 applies to the formal deportation hearing and it is submitted that it does not. That deportation hearings are not provided for by Section 16 is further supported by the government's contention with which we agree, that the requirement for deportation hearings is not in terms set forth in the statute.

It therefore follows that the holding below was erroneous because Section 16 does not provide that deportation cases shall be heard before immigrant inspectors and the exemption of Section 7(a) of the Administrative Procedure Act is inapplicable.

Point III

SECTION 5(c) OF THE ADMINISTRATIVE PROCEDURE ACT IS APPLICABLE

The government concedes that the exemption in Section 7(a) for certain statutory hearing officers "is not necessarily an exception from all of the provisions of Sections 5, 7 and 8." (Brief p. 45.) The Attorney General's Manual on the Administrative Procedure Act (p. 72) states that in cases where the exemption of 7(a) of the Administrative Procedure Act is invoked Section 5(c) is inapplicable only if inconsistent with the exemption. The government's brief herein states:

> "Also, the express exception of Section 7(a) for certain statutory hearing officers necessarily carries with it as much of an exception from the general separation of functions requirement of Section 5(c) as is necessary to give effect to the express exception." (Brief p. 44.)

The government correctly asserts that Congress did not desire to alter existing statutory proceedings. (Brief pp. 53, 54.) It provided in Section 7(a) that nothing in the act should supersede the *conduct* of specified classes of proceedings before officers specially designated by statute. The *conduct* of deportation hearings is not prescribed by Section 16 or any other section of the immigration statute and there is therefore nothing to be superseded. Moreover, there is nothing inconsistent with a requirement that deportation proceedings be conducted before immigrant inspectors and Section 5(c) of the Administrative Procedure Act prohibiting such inspectors from being subjected to the control or supervisions of investigatory officials. Indeed, the respondents' regulations requiring such hearing officers to refrain from engaging in the investigation of cases where they preside (8 C.F.R. 150.6-b) is not deemed inconsistent with the mandate of the deportation statute. Petitioner therefore

concludes that the Section 7(a) exemption does not except the deportation proceedings from the operation of Section 5(c) because it is not inconsistent therewith.

Point IV

OTHER CONTENTIONS OF RESPONDENTS NOT MATERIAL TO ISSUES HEREIN

Several miscellaneous assertions of the respondent will be given passing notice.

1. The record herein does not reveal and petitioner does not concede that he is "obviously deportable." He entered the United States legally. At the administrative hearing he testified that he was opposed to Communism. If deported, he would be returned to Shanghai, which fell to the Communists since his hearing. Petitioner is entitled to adjustment of his status to that of a permanent legal resident pursuant to Section 4 of Public Law 774, 80th Congress on the ground that he cannot return to China because of fear of persecution on account of his political opinions. Petitioner also believes that he is entitled to relief from deportation pursuant to 8 U.S.C. 155(c)(4).

2. Congress never acquiesced in respondents' interpretation of Section 5 of the Administrative Procedure Act. Congressional committees acted upon respondents' request for exemption but Congress itself never did. The House Judiciary Committee approved a blanket exemption from the operation of the Act with a dissent. The Senate Judiciary Committee refused to grant a blanket exemption but was willing to specifically provide that immigrant inspectors preside over deportation proceedings and thus give the Immigration Service an exemption under Section 7(a). The Senate and House Committees never came to an agreement on the type of exemption to be accorded the Immigration Service and it was never clear "that Congress was pre-

pared to confirm the administrative construction by clarifying legislation." (See Respondents' Brief p. 40.) On the contrary, it is equally logical to contend that the proposed legislation was corrective and necessary, rather than clarifying. And, assuming that Congress was *prepared* to enact "clarifying legislation" by what canon of statutory construction does that reinforce the government's interpretation of the statute?

3. The Respondents' interpretation of Section 5 of the Administrative Procedure Act is a strained one which does violence to the express language of the section and to the history of the Act. It was reached after divergent views had been expressed within the Department of Justice (Carusi, *Monthly Review*, Immigration and Naturalization Service, February, 1947 p. 99). Members of the Board of Immigration Appeals advised the Justice Department in 1946 that the deportation process was subject to the Administrative Procedure Act. Nevertheless, the respondents determined to follow its interpretation, criticized as it was from within the Department of Justice, and from without. 56 *Yale Law Journal* 683, 697, *Eisler* v. *Clark*, 77 F. Supp. 610. Despite this, respondents attempt to convey the impression that they acted with perfect assurance that their interpretation was correct.

4. Respondents assert that they will be subjected to inconvenience and expense if they are compelled to comply with the Administrative Procedure Act. At the same time, however, they say that they substantially comply with the provisions of that Act (Brief pp. 43, 56, note 27). See also: *Monthly Review*, Immigration and Naturalization Service, *supra*, p. 103). When the Attorney General recommended the enactment of the Administrative Procedure Act, he specifically recognized that in many agencies of the government the hearing examiner requirements would

result in increased expenses. Nevertheless, he stated that "this provision was one of the most important provisions in the Act." Senate Document 248, 79th Congress, p. 228. Major Schofield's testimony quoted at page 23 of our main brief contradicts respondents' assertions of inconvenience or alleged interference with the administration of the deportation laws. The interpretation of the law and the administration of justice does not hinge on allegations of inconvenience or expense to the government or to private parties.

Ten thousand cases already processed will not be affected by this decision. Deportation and the intervening oceans have washed away whatever errors were committed in most of those cases. Only those cases where the instant issue has been raised and those where the alien is still here will have to be reprocessed. The number of such cases is small. But, whether the number of cases or the expense be great or small, the issue herein is one of law and if the respondents have violated the Administrative Procedure Act, as we contend, judgment should be rendered in favor of petitioner.

Respectfully submitted,

JACK WASSERMAN,
GASPARE CUSUMANO,
IRVING JAFFE,
Of Association of Immigration and Nationality Lawyers,
Warner Building,
Washington, D. C.,
Attorneys for Petitioner.

THOMAS A. FARRELL,
Of Counsel.